

MYRA MONTES,

V.

Defendant.

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

1 Plaintiff applied for SSI in September 2001 alleging disability since March 2001, due to
2 back pain, nausea, sleep apnea, and dizziness. AR 80-84, 91. Her claim was denied initially and
3 upon reconsideration, and she requested an ALJ hearing. On July 3, 2003, a *de novo* hearing was
4 held before ALJ Joyner. The ALJ heard testimony from Plaintiff, who was represented by
5 counsel; a medical expert and a vocational expert also testified. AR 260-329. On October 6,
6 2003, the ALJ rendered a decision finding Plaintiff not disabled. AR 31-40. The Appeals
7 Council denied review of the ALJ's decision and Plaintiff brought suit in this district court. On
8 November 29, 2005, Magistrate Judge Benton issued a Report and Recommendation (AR 360-
9 66), which was adopted by the assigned district judge (AR 359), recommending the court reverse
10 and remand for a rehearing.

11 On February 1, 2007, a second administrative hearing was held before ALJ Joyner. The
12 ALJ heard testimony from Plaintiff who was represented by counsel; two medical experts and a
13 vocational expert also testified. AR 626-61. On April 25, 2007, the ALJ rendered an
14 unfavorable decision again finding Plaintiff not disabled. AR 344-57. Plaintiff requested review
15 by the Appeals Council and review was denied, rendering the ALJ's decision the final decision
16 of the Commissioner. 20 C.F.R. §§ 404.981, 422.210 (2006). On October 8, 2008, Plaintiff
17 initiated this civil action for judicial review of the Commissioner's final decision.

18 II. JURISDICTION

19 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. sections
20 405(g) and 1383(c)(3).

21 III. STANDARD OF REVIEW

22 Pursuant to 42 U.S.C. section 405(g), this Court may set aside the Commissioner's denial
23 of social security benefits when the ALJ's findings are based on legal error or not supported by
24 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir.
25 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such
26 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
27 *Richardson v. Perales*, 402 U.S. 389, 402 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
28 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical

1 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d
2 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may
3 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas*
4 *v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than
5 one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

6 IV. THE DISABILITY EVALUATION

7 As the claimant, Ms. Montes bears the burden of proving that she is disabled within the
8 meaning of the Social Security Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999)
9 (internal citations omitted). The Act defines disability as the "inability to engage in any
10 substantial gainful activity" due to a physical or mental impairment which has lasted, or is
11 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§
12 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are
13 of such severity that she is unable to do her previous work, and cannot, considering her age,
14 education, and work experience, engage in any other substantial gainful activity existing in the
15 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180
16 F.3d 1094, 1098-99 (9th Cir. 1999).

17 The Commissioner has established a five-step sequential evaluation process for
18 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
19 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
20 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at any
21 step in the sequence, the inquiry ends without the need to consider subsequent steps.

22 Step one asks whether the claimant is presently engaged in "substantial gainful activity."
23 20 C.F.R. §§ 404.1520(b), 416.920(b).¹ In the present case, the ALJ found that Plaintiff had not
24 engaged in substantial gainful activity since the alleged onset of the disability. AR 347, Finding
25 1. At step two, the claimant must establish that she has one or more medically severe
26 impairments, or combination of impairments, that limit her physical or mental ability to do basic

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28 ¹Substantial gainful activity is work activity that is both substantial, *i.e.*, involves significant
physical and/or mental activities, and gainful, *i.e.*, performed for profit. 20 C.F.R. § 404.1572.

1 work activities. If the claimant does not have such impairments, she is not disabled. 20 C.F.R.
2 §§ 404.1520(c), 416.920(c). In this case, the ALJ found Plaintiff has the severe impairments of
3 obesity, obstructive sleep apnea, and borderline intellectual functioning. AR 347, Finding 2. If
4 the claimant does have a severe impairment, the Commissioner moves to step three to determine
5 whether the impairment meets or equals any of the listed impairments described in the
6 regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d). A claimant whose impairment meets or
7 equals one of the listings for the required twelve-month duration requirement is disabled. *Id.* In
8 this case the ALJ found that Plaintiff's impairments did not meet or equal the requirements of
9 any listed impairment. AR 350, Finding 3.

10 When the claimant's impairment neither meets nor equals one of the impairments listed
11 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's
12 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
13 Commissioner evaluates the physical and mental demands of the claimant's past relevant work to
14 determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). The
15 ALJ in this case found Plaintiff:

16 [H]as the residual functional capacity to occasionally lift and carry 10 pounds,
17 frequently lift and carry less than 10 pounds, stand at least 2 hours in an 8-hour
18 workday, walk at least 2 hours in an 8-hour workday, and sit about 6 hours in an
19 8-hour workday. She is limited to occasional stooping, kneeling, crouching,
20 crawling, and climbing of ramps and stairs with no climbing of ladders, ropes, and
21 scaffolding. She needs to avoid exposure to hazards such as moving machinery
22 and working at heights. Her borderline intellectual functioning limits her to
23 simple repetitive tasks.

24 AR 350-51, Finding 4.

25 However, the ALJ found that Plaintiff's past work does not qualify as "past relevant
26 work." AR 355, Finding 5. If the claimant is able to perform her past relevant work, she is not
27 disabled; if the opposite is true, the burden shifts to the Commissioner at step five to show the
28 claimant can perform other work that exists in significant numbers in the national economy,
taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§
404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the
claimant is unable to perform other work, the claimant is found disabled and benefits may be

1 awarded. In this case, the ALJ found that Plaintiff is able to perform work including jobs such as
2 assembler and addresser. AR at 355-56, Finding 9. The ALJ therefore concluded Plaintiff was
3 not disabled as defined in the SSA. *Id.*

4 V. ISSUES ON APPEAL

5 Plaintiff presents the following principal issues on appeal:

- 6 1. Did the ALJ properly evaluate the opinions of treating physician Dr. Sheahan?
- 7 2. Does substantial evidence support the ALJ's finding that Plaintiff has a high
8 school education?
- 9 3. Does the objective evidence show at most mild abnormalities?
- 10 4. Did the ALJ properly evaluate examining psychologist Dr. Moore's opinions?
- 11 5. Did the ALJ properly apply 20 C.F.R. § 416.930?
- 12 6. Did the ALJ properly evaluate medical expert Dr. Nielson's testimony?
- 13 7. Does substantial evidence support the ALJ's step-three finding that Plaintiff does
14 not meet or equal a listed impairment?

15 Dkt. No. 8 at 1.

16 VI. DISCUSSION

17 The parties agree that the ALJ again made multiple errors in the second decision in this
18 case. Plaintiff argues a remand for payment of benefits is appropriate; Defendant argues an
19 award of benefits is not warranted. Remand for payment of benefits is proper when there are no
20 outstanding issues to be resolved before a determination of disability can be made. *See Smolen*
21 *v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). For the reasons outlined below, the Court finds
22 multiple issues remain to be resolved in this case and therefore remands for further
23 administrative proceedings. Because this case has been before the same ALJ twice resulting in
24 decisions with multiple errors, the Court recommends the Appeals Council assign the case to a
25 *different* ALJ.

26 Dr. Sheahan

27 Plaintiff argues the Court should hold that she is disabled in light of treating physician
28 Dr. Sheahan's 2001 opinion that she is severely limited in her ability to perform even half-time

1 work due to morbid obesity (AR 124). Dkt. 8 at 5-9; Dkt. 14 at 3-6. The remand order found
2 that the ALJ's first decision did not give sufficient reasons for rejecting Dr. Sheahan's opinion
3 and directed the Commissioner to reconsider Dr. Sheahan's findings. AR 365-66. The court
4 found that "[b]ecause the ALJ failed to give clear and convincing reasons for rejecting Dr.
5 Sheahan's opinion that Montes could not perform even part-time sedentary work, we credit Dr.
6 Sheahan's opinion as true." AR 366. The court concluded that the first requirement under
7 *Smolen*² was met but found that issues remained to be resolved which required consideration of
8 Dr. Sheahan's and Dr. Wolf's opinions as well as consideration of mental impairment evidence.
9 *Id.*

10 Defendant concedes that in the second decision the ALJ "misstated Dr. Sheahan's
11 findings and did not properly address Dr. Sheahan's opinion." Dkt. 13 at 7. The parties agree
12 that the ALJ erred in again failing to properly assess Dr. Sheahan's opinion. Consistent with the
13 prior remand order in this case, the Court again remands for the ALJ to consider fully and
14 properly Dr. Sheahan's opinion. The ALJ shall thoroughly explain the weight assigned to Dr.
15 Sheahan's opinion in considering Plaintiff's claims.

16 *Plaintiff's Education*

17 Plaintiff argues that the ALJ erroneously evaluated her education level in finding that she
18 has a high school education without noting that she took special education classes throughout
19 high school. Defendant concedes, but argues that a lack of high school education does not prove
20 a claimant is unable to work at simple unskilled jobs. Regardless, the Court notes that on
21 remand the ALJ will have the opportunity to discuss Plaintiff's special education courses as
22 relates to her intellectual functioning, and how if at all, it impacts finding that she has a "high
23 school education." The ALJ shall discuss any impact special education has on her residual
24 functional capacity.

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26 ² *Smolen* provides that the court may credit evidence as true and remanded for an award of
27 benefits where "(1) the ALJ has failed to provide legally sufficient reasons for rejecting such
28 evidence, (2) there are no outstanding issues that must be resolved before a determination of
disability can be made, and (3) it is clear from the record that the ALJ would be required to find
the claimant disabled were such evidence credited." *Smolen*, 80 F.3d at 1292.

1 Objective Findings; Dr. Moore's Opinion; Dr. Nielson's Opinion

2 Plaintiff argues the ALJ erred by misstating the severity of objective findings with
3 respect to her obesity and mental ability. Plaintiff also asserts the ALJ erred in failing to
4 evaluate examining psychologist Dr. Moore's opinion regarding her mental limitations, and
5 improperly relied upon the hearing testimony of medical expert Dr. Nielson. Defendant's
6 position is that "[t]he Commissioner does not address these contentions of error, because the
7 errors regarding medical evidence compel remand." Dkt. 13 at 12. The parties agree that the
8 ALJ erred in assessing the medical evidence. A proper analysis of the medical evidence is
9 required before a complete decision can be rendered. Plaintiff's residual functional capacity
10 must be reevaluated based on a complete assessment of the medical evidence. On remand, the
11 ALJ will have the opportunity to address the objectivity of the medical evidence, the opinions of
12 Doctors Moore and Nielson, and discuss the weight assigned to their opinions supported by
13 substantial evidence in the record.

14 Failure to Follow Treatment

15 Plaintiff argues that the ALJ erred in citing to regulation 20 C.F.R. § 416.930, which
16 addresses a claimant's failure to follow a physician's prescribed treatment. The ALJ cited the
17 regulation in noting that Plaintiff had been told by physicians to lose weight, exercise, and
18 improve her diet. AR 352. Defendant concedes that the ALJ erred in citing to this regulation,
19 but argues it was not a basis for the ALJ's denial. Regardless, the parties agree that the ALJ is in
20 error by relying on the regulation; therefore, reversal is also appropriate on this ground.

21 Listing Equivalence

22 Plaintiff argues that the ALJ erred in not addressing whether she "equals" a listed
23 impairment at step three. At the first hearing, Dr. Wolf testified that Plaintiff equaled a listing
24 based on her obesity, sleep apnea, and back impairment. The ALJ failed to address Dr. Wolf's
25 opinion in the first decision and was instructed to do so on remand. Defendant concedes the ALJ
26 again erred in failing to address the issue of listing equivalence in the second opinion, both with
27 respect to Plaintiff's physical impairments as relates to her spine and sleep disorder, as well as to
28 her mental impairments related to borderline intellectual functioning.

1 The parties agree that the ALJ again erred in failing to discuss listing equivalence.
2 Plaintiff argues that she clearly equals Listing 12.05(C) for mental retardation and asks the Court
3 to award benefits without remanding for further proceedings. Specifically, Plaintiff argues that
4 Listing 12.05(C) essentially requires: (1) an IQ of 70 or less; (2) deficits in adaptive functioning;
5 and (3) an additional limitation of function; and argues that Defendant concedes she meets the
6 first and third requirements but not the second requirement. Plaintiff argues that regardless, her
7 *combined* impairments equal the listing because she has two additional limitations of function
8 (obesity and obstructive sleep apnea, as found by the ALJ), which more than equal the third
9 requirement. However, the Court fails to see how Plaintiff's argument that she meets the third
10 requirement twice is equivalent to meeting the second requirement. Thus, based on the record
11 before the Court, it is not clear whether Plaintiff equals the listing. On remand, the ALJ shall
12 specifically discuss whether Plaintiff's combined impairments equal the requirements of listing
13 12.05(C).

14 VII. CONCLUSION

15 For the reasons set forth above, the Commissioner's decision is REVERSED and the case
16 is REMANDED for further administrative proceedings in accordance with this order.

17 DATED this 20th day of April, 2009.

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20 Carolyn R. Dimmick
21 United States District Judge
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